No. 77-1806

In the Supreme Court of the United States

OCTOBER TERM, 1978

FORD MOTOR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 571 F. 2d 993. The decision and Order of the National Labor Relations Board (Pet. App. A18-A45) are reported at 230 NLRB No. 101.

JURISDICTION

The court of appeals denied the Company's petition for rehearing *in banc* on March 23, 1978 (Pet. App. A46) and entered its judgment on April 18, 1978 (Pet. App. A47-A48). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly held that the prices and service of food sold in petitioner's in-plant cafeteria and vending machine operations are mandatory subjects of bargaining under the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. A49.

STATEMENT

1. Petitioner is engaged in the business of stamping automotive parts at a plant located on a site one-quarter-mile square in Chicago Heights, Illinois. The plant employs approximately 3,600 hourly-rated production employees, who work in a three-shift operation. These employees are represented by Local 588, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (hereafter "Local 588" or "the Union"). The International UAW is

the certified bargaining representative, and Local 588 is its local administrative component; there is no other bargaining representative in the plant (Pet. App. A32). Petitioner and the International UAW have had a series of national collective-bargaining agreements covering plant employees since approximately 1956, when the International was certified; and Local 588 and the petitioner have, in addition, negotiated a series of local agreements (Pet. App. A35-A36). The relevant national agreement ran from November 1973 until September 1976, and the relevant local agreement, from June 1974 until September 1976 (*ibid.*).

Petitioner provides its employees with two air-conditioned cafeterias and five air-conditioned vending machine areas, called "coke cribs" (Pet. App. A33). The larger cafeteria, which is open for breakfast and scheduled meal periods, seats 400 to 500 employees (*ibid.*). Vending machines located in this cafeteria area are accessible during shift changes (*ibid.*). The other cafeteria seats about 50 to 100 persons, and contains two coffee machines and twelve vending machines that dispense a variety of foods. Each "coke crib" contains vending machines dispensing a variety of foods; four of these coke cribs have a seating capacity of 40 to 50 persons and one seats 75 to 100 persons (Pet. App. A34).

The cafeteria and vending areas are serviced by ARA Services, Inc., (hereafter "ARA") pursuant to a 1972 agreement with petitioner (Pet. App. A32). Under the agreement, ARA furnishes food, machines,

management, and personnel (Pet. App. A32-A33). Section 2(d) of the contract states that ARA shall (Pet. App. A19-A20):

> furnish products of quality in accordance with purchasing specifications that shall have been submitted to and approved by [petitioner], and in accordance with a price and portion list for said manual food service and vending machines that shall have been submitted to [petitioner] and that shall be subject to review at the request of [petitioner] or [ARA].

The agreement authorizes petitioner to inspect all machines and equipment to determine compliance with established standards of quality and cleanliness. Section 3(a) of the agreement provides that petitioner shall reimburse ARA for all direct costs of the food and vending operations and pay ARA a surcharge consisting of an allowance for general administrative costs equivalent to four percent of net receipts and a service fee of five percent of net receipts (Pet. App. A20). Should the receipts exceed ARA's costs plus the nine percent surcharge, petitioner is entitled to the excess (*ibid.*). When revenues do not meet the costs of the operation plus the surcharge, petitioner is obligated to subsidize ARA by an amount not exceeding $52,000 per year; and, at times in recent years, it has had to do so (Pet. App. A20, A33). The contract is terminable by either party upon 60 days' notice (*ibid.*).

Employees have a 30-minute lunch period plus two 22-minute breaks, and employees who work directly

on production lines are entitled to a 5-minute wash-up period before their meals (Pet. App. A34). Employees are not allowed to leave the plant building during the break periods, and it is not feasible for them to leave during the lunch period (Pet. App. A35). Only a very small number of employees (approximately 12 out of the 3,600) actually leave the plant during the lunch period (Pet. App. A20). Mobile food vending trucks are not permitted on plant property and are not usually available outside the plant gate (Pet. App. A35).

Employees are permitted to bring their own food into the plant, but they may store food only in personal lockers (Pet. App. A35). The lockers are located in rooms that are ventilated but not air-conditioned, and employees have no refrigeration facilities (*ibid.*). During the summer months, when temperatures frequently range between 80 to 100 degrees, the locker rooms become hot and sticky, and employees have complained about food spoilage (*ibid.*). Petitioner has on occasion used exterminator services after the employees complained about the sanitary conditions in the locker rooms (Pet. App. A35). Food may be eaten only in the cafeterias or "coke cribs."

Although petitioner has at all times refused to bargain about the food prices ARA set with petitioner's approval, petitioner has bargained over food services. Since 1967, the local contract has included provisions dealing with vending and cafeteria services, such as the staffing of service lines and the restocking and

repair of vending machines (Pet. App. A20, A36-A39). The 1974 local agreement also states, "The Company recognizes its continuing responsibility for the satisfactory performance of the caterer and for the expeditious handling of complaints concerned with such performances" (Pet. App. A38).

On February 6, 1976, petitioner informed the Union for the first time that cafeteria and vending machine prices would be increased on February 9 by an unspecified amount (Pet. App. A21, A39).[1] Petitioner refused the Union's request to discuss the increases before they were put into effect, and, on February 9, the prices were increased from 5 to 10 cents an item (*ibid.*). In response to subsequent Union requests, petitioner also refused to bargain about cafeteria and vending machine prices and services or to supply information on petitioner's role in cafeteria and vending operations sought as an aid in administering the existing contract and preparing for upcoming contract negotiations (Pet. App. A21-A22, A39).

On February 16, the Union began a boycott of the food service operations in which more than one-half of the employees participated (Pet. App. A22, A40). The cafeteria boycott ended on May 19, and the vending machine boycott ended on June 7 (Pet. App. A40). The onset of hot weather, which resulted in the spoilage of food employees brought from home,

[1] All dates hereafter refer to 1976 unless otherwise specified.

and the lack of success in reducing prices led to the cancellation of the boycott (*ibid.*).

2. The Board, reversing the administrative law judge, held that in-plant cafeteria and vending machine food prices and services are mandatory subjects of bargaining, and that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union or to supply requested information on those subjects (Pet. App. A18-A28). In reaching this conclusion, the Board adhered to a position theretofore rejected by the court below in *National Labor Relations Board* v. *Ladish Co.*, 538 F. 2d 1267 (C.A. 7). The Board observed (Pet. App. A23 n. 11), however, that "the instant case, on its facts, is in many respects a stronger case than *Ladish* * * *." It specifically noted, among others, the following factors that were present in the instant case and absent in *Ladish*: (1) petitioner's "right to review prices and its leverage of the subsidy agreement," (2) the possibility of petitioner's making a profit on the food service operation, (3) the bargaining history regarding some features of cafeteria and vending machine services, (4) the lack of a viable alternative to the in-plant food operations, given the lack of adequate facilities for storing bag lunches; and (5) the demonstration through the boycott of serious and widespread employee concern over in-plant food service and prices (*ibid.*).

The Board ordered petitioner, *inter alia*, to bargain with the Union, upon request, regarding "food

services and any changes, now in effect or hereafter made or proposed" in cafeteria or vending machine food prices, and to supply any requested information essential to collective bargaining concerning petitioner's "role in the cafeteria and vending machine operations" (Pet. App. A27).

3. The court of appeals enforced the Board's order. As had the courts in previous cases involving this issue,[2] the court of appeals rejected (Pet. App. A9) the general proposition that "in-plant cafeteria and vending machine food prices and services are necessarily" mandatory subjects of bargaining. It found (Pet. App. A14-A15), however, that the instant case was factually distinguishable from the earlier cases involving this issue in which the Board's orders had been denied enforcement, and it held (Pet. App. A13-A14) that "under the facts and circumstances of this case, in-plant cafeteria and vending machine food prices and services materially and significantly affect and have an impact upon terms and conditions of employment, and therefore are mandatory subjects of bargaining."

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[2] *National Labor Relations Board* v. *Ladish Co., supra; National Labor Relations Board* v. *Package Machinery Co.*, 457 F. 2d 936 (C.A. 1), denying enforcement of 191 NLRB 268; *McCall Corporation* v. *National Labor Relations Board*, 432 F. 2d 187 (C.A. 4), denying enforcement of 172 NLRB 540; *Westinghouse Electric Corporation* v. *National Labor Relations Board*, 387 F. 2d 542 (C.A. 4) (*en banc*), reversing 369 F. 2d 891, and denying enforcement of 156 NLRB 1080.

ARGUMENT

Because the decision of the court of appeals turned on the facts of this case, it does not conflict with earlier court decisions cited by petitioner (Pet. 7), which denied enforcement of Board orders issued in different factual settings. Accordingly, there is no legal issue warranting certiorari.

It is the Board's position that the prices of food served in a plant's cafeteria or vending machine facilities are an integral part of employees' daily working conditions—one of the "physical dimensions of [their] working environment." *Ladish Company*, 219 NLRB 354, 357, quoting *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 222 (Stewart, J., concurring). Such prices are therefore, in the Board's view, "conditions of employment" within the meaning of Section 8(d) of the Act, 29 U.S.C. 158(d), and mandatory subjects of bargaining.[3] As noted above (*supra*, p. 8), the courts have not agreed with this general principle.

However, prior to its adoption of this general rule regarding food services, the Board held in *Weyer-*

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[3] The Board has also pointed out that the provision of in-plant eating facilities may be considered a form of "wages" within the meaning of Section 8(d), particularly where employer subsidies of the facilities may be reflected in the prices charged for the food. *Weyerhaeuser Timber Co.*, 87 NLRB 672, 675-676. See also *Ladish Co., supra*, 219 NLRB at 358 (lower vending machine prices are "a direct tax-free benefit"). In the present case, as shown (*supra* p. 4), petitioner subsidized the food supply operations up to a limit of $52,000 per year.

haeuser Timber Co., 87 NLRB 672, that in circumstances where the employees have no adequate alternative source of meals during the workday, the employer's food prices are mandatory subjects of bargaining.[4] The court here agreed (Pet. App. A12), commenting that, "[t]he food one must pay for and eat as a captive customer within the employer's plant can be viewed as a physical dimension of one's working environment." The court found that the employees here were such captive customers because there was no feasible alternative to in-plant food services.[5]

On the other hand, *Weyerhaeuser* was expressly distinguished in the cases upon which petitioner relies. For example, in *Westinghouse Electric Corporation* v. *National Labor Relations Board*, *supra*, 387 F. 2d at 548, the court noted that unlike the employees in *Weyerhaeuser*, who "were virtually captive customers" because of the remoteness of their work site, the employees in the case before it had "available alternatives." Similarly, the panels in *McCall Corporation*

[4] In *Weyerhaeuser*, the employees purchased their meals from employer-provided facilities at their isolated work locations in logging camps and a saw mill.

[5] The court upheld (Pet. App. A2-A3) the Board's findings (1) that it was not feasible for employees to leave the plant during their 30-minute lunch period, (2) that there were no mobile food vending trucks available on the plant property, and (3) that facilities for storing sack lunches were such that food spoilage resulted in the summer months. Accordingly, the court of appeals concluded (Pet. App. A15) that those potential sources of in-plant meals were not feasible alternatives.

v. *National Labor Relations Board*, *supra*, 432 F. 2d at 188, *National Labor Relations Board* v. *Package Machinery Co.*, *supra*, 457 F. 2d at 937, and *National Labor Relations Board* v. *Ladish Co.*, *supra*, 538 F. 2d at 1270, accepted the result in *Weyerhaeuser*, but found that the cases before them did not approximate the *Weyerhaeuser* fact pattern because the employees had viable alternatives to patronage of the in-plant food facilities.[6]

In sum, this case presents a narrow factual question—namely, whether there is substantial evidence to support the finding that, as in *Weyerhaeuser*, there were no feasible alternatives to use of the employer-provided facilities. That question does not warrant review by this Court.

[6] In *National Labor Relations Board* v. *Ladish, Co.*, *supra*, 538 F. 2d at 1271, the court of appeals faulted the Board for having "refuse[d] to consider" the alternative of bringing sack lunches from home. The court also noted that Member Jenkins' remarks on the subject of "brown bagging" in his concurring opinion (219 NLRB at 360 n. 36) were supported only by a citation to an arbitration decision holding that if an employer reimburses employees who eat in restaurants for the cost of their meals, it must reimburse employees who bring lunches from home for the cost of those lunches. There was no Board finding, as here, that physical conditions in the plant made sack lunches a less than feasible alternative.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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